

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

CASE NO. 16-RC-266439

LAZARUS ENERGY HOLDINGS, LLC,

Employer,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY,
ALLIED-INDUSTRY AND SERVICE WORKERS INTERNATIONAL UNION AFL-CIO

Petitioner.

**LAZARUS ENERGY HOLDINGS, LLC'S EMERGENCY MOTION TO STAY MAIL
BALLOT ELECTION AND REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR'S DECISION AND DIRECTION OF ELECTION TO THE NATIONAL
LABOR RELATIONS BOARD**

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COMES NOW counsel for Lazarus Energy Holdings, LLC ("Lazarus Energy"), and, pursuant to Sections 102.66(H), 102.67, 102.69, and 102.71 of the Rules and Regulations of the National Labor Relations Board ("Board") (as amended in 2019), and as supported by the General Counsel's Memorandum GC 20-07, files this Emergency Motion to Stay Mail Ballot Election and Request for Review of the Regional Director's Decision and Direction of Mail-Ballot Election dated October 23, 2020. ("Motion"). Lazarus Energy requests the National Labor Relations Board ("NLRB" or "Board") require Region 16 to conduct a manual ballot election at Lazarus Energy's San Antonio, Texas facility, consistent with the COVID-19 protocol set forth in the General Counsel's 20-10 Memorandum.¹ As fully discussed below, the Board should stay the pending mail ballot election while it reviews the Employer's Request for Review because the Regional Director's Decision ignored and misapplied controlling precedent. In addition, the Regional Director made findings that were either unsupported by, or contrary to, the documentary evidence admitted at the hearing.

The following extraordinary circumstances compel the NLRB to grant this Motion *to immediately stay the distribution of mail ballots scheduled to commence on November 3, 2020, pursuant to the Regional Director's October 23, 2020, Decision and Direction of Election.*

- The Decision presents a substantial question of law or policy because it presents a departure from officially reported Board precedent. *See San Diego Gas & Electric*, 325 NLRB 1143 (1998).

¹ On July 6, 2020, General Counsel Peter B. Robb issued GC Memorandum 20-10 containing suggested manual election protocols and reiterating that "the Board has ultimate authority to make decision on when, how and in what matter elections are conducted . . ." *See* GC Memorandum 20-10.

- The Direction of a mail ballot election in this case is directly at odds with the Board’s recent decisions in *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020), *Airgas, USA LLC*, 16-RC-262896 (September 24, 2020), and *Ecolab*, 16-RC-264667 (October 1, 2020) where the Board granted the employer’s emergency motion to stay mail ballot election.
- A substantial question of law or policy is raised because neither Board precedent nor the record evidence in this case support the Regional Director’s decision to order a mail ballot election based solely on the general presence of COVID-19 in Texas, despite the Board’s preference for manual elections and the specific safety protocols in place at the facility to protect those involved in the election.
- The Regional Director abused his discretion and erred in ordering a mail ballot election. Moreover, this error cannot be remedied in a post-election proceeding, as the election will already have been completed.

The Board should overturn the Regional Director’s Decision to mandate a mail ballot election when: (1) a manual ballot election can be safely conducted at Lazarus Energy’s facility by following the Board’s COVID-19 election protocol;² and (2) Lazarus Energy demonstrates that the COVID-19 risk has been minimized at the specific operations impacted by the underlying petition for an election. Here, the employees in the Regional Director’s defined voting unit report to work at four separate Lazarus Energy locations in Karnes and Bexar County every day, and Lazarus Energy has already instituted or will institute all reasonable safety protocols, including those set forth in GC Memorandum 20-10.

STATEMENT OF THE CASE

On September 22, 2020, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the “Union”), filed a representation petition (“Petition”) in Case No. 16-RC-266439 seeking certification as the

² Lazarus Energy is uniquely prepared to comply with the GC’s protocols. Lazarus Energy is a critical infrastructure industry essential employer as defined by the Department of Homeland Security – Cybersecurity & Infrastructure Security Agency (“CISA”). Tr. 16-17. As an essential business, Lazarus Energy has maintained full operations for the duration of the pandemic while complying with all government guidelines related to reducing the spread of the coronavirus including, but not limited to, those specific to face coverings, social distancing, and increased sanitation.

exclusive bargaining representative of the following unit at Lazarus Energy's operations located in the San Antonio, Texas area:

Employees Included:

All full-time and regular part-time operators and maintenance employees, including terminal operators, lab techs, instrument techs and electricians.

Employees Excluded:

Office clericals and professional employees, supervisors and all others as defined by the Act.

Bd. Ex. 1(a).³

The parties participated in hearing on October 13, 2020, ("Hearing") where the sole issue discussed was the method of election. Tr. 9; Bd. Ex. 2. As outlined in the Employer's Statement of Position, at the Hearing, and in its Post-Hearing Brief filed on October 21, 2020, Lazarus Energy maintained its position that a manual ballot election is the appropriate voting process. Tr. 16. Lazarus Energy stipulated to follow the conditions and COVID-19 protocol outlined in GC Memorandum 20-10. E. Ex. 2. Lazarus Energy also presented evidence to illustrate that manual ballots are the most appropriate method of election in this case, and there are insufficient extraordinary circumstances to depart from the Board's longstanding preference for in-person elections and ensuring maximum voter participation. Tr. 16. While the Union refrained from opposing Employer's request, they considered a manual ballot election with the condition that the Regional Director schedule it as soon as possible. Tr. 16.

³ References to the hearing transcript will be referred to as "Tr.," followed by the appropriate page number(s). References to exhibits introduced into evidence at the hearing are designated by the exhibit number, preceded by "Bd. Ex." for the Board's exhibits, and "E. Ex." for Lazarus Energy's exhibits.

On October 23, 2020, the Regional Director issued the Decision and Direction of Election (“DDE” or “Decision”) (*see* Appendix). In the Decision, the Regional Director recognizes the Board’s strong preference for manual ballots, but then orders a mail ballot election based upon the “extraordinary circumstances of the COVID-19 pandemic.” DDE, p. 5, 13.

The Regional Director went out of his way to discuss the presence of COVID-19 in Texas generally while glossing over its limited presence in Bexar and Karnes County where the employees in the petitioned-for unit work. The Regional Director did not discuss the small number of cases in Bexar and Karnes County where the facilities are located, but instead includes lengthy discussion about Dallas County and Tarrant County. The Regional Director did not meaningfully discuss the small number of cases at the facilities where the employees in the petitioned-for unit work. The Regional Director did not give credence to the fact that none of the employees who have contracted COVID-19 had their infection traced to the facility. Instead, the Regional Director focused on the potential for infection, using no data, just his own opinion, to show that a manual election somehow increases the risk of infection at the facility. In addition, the Regional Director ignored Lazarus Energy’s legitimate concerns regarding employee participation in this particular unit, setting aside NLRB Region 16’s own data reflecting voter participation rates in elections petitioned after the pandemic started. The Regional Director has abused his discretion in ordering a mail ballot election under these circumstances.

Although the Board allowed mail ballot elections over the first few months of the pandemic, the unknown risks of COVID-19 have significantly diminished: it is a known and manageable part of daily life for Lazarus Energy and its employees who report to work every day to perform essential work. Further, the spread of the pandemic has stabilized as both employers and the general public adapt to what increasingly appears to be a new normal. While the Regional Director admits Bexar

and Karnes County reflect COVID-19 positive numbers that are lower than other parts of Texas, he expands the analysis at length to include the same results from Dallas and Tarrant Counties. DDE, p. 9, 11, 13, 17.

The General Counsel has recognized this variance around the country, and in fact from county to county, by issuing guidelines to conduct manual elections safely in the wake of COVID-19. GC Memorandum. 20-10, Attachment B. *See, e.g., id.; Victory Wine Group, LLC*, Decision and Direction of Election, No. 16-RC-257874, slip op. at 5-7 (Reg'l Dir., April 23, 2020). The Board's recent decision in *Aspirus Keweenaw*, 370 NLRB No.13 (August 25, 2020) illustrates its own recognition that it is an abuse of discretion for a Regional Director to order a mail ballot election based on the mere existence of the pandemic. *See also Airgas, USA LLC*, 16-RC-262896 (September 24, 2020) and *Ecolab*, 16-RC-264667 (October 1, 2020). For eligible voters, all of whom report to the four facilities implicated by this election daily, a manual election poses no additional risk.

I. BACKGROUND

Lazarus Energy is a critical infrastructure industry essential employer as defined by the Department of Homeland Security – Cybersecurity & Infrastructure Security Agency (“CISA”). Tr. 16-17. In terms of the facilities included in petitioned-for unit, the petition before the Region seeks to have an election for a group of approximately 57 Lazarus Energy employees who are based in one of four locations:

1. 1 BDA Crossing, San Antonio, Texas 78235– Bexar County;
 - a. Referred to as the Administration Building, approximately 15 employees in the petitioned-for unit report to this address.
2. 7811 S. Presa Street, San Antonio, Texas 78223 – Bexar County;

- a. Referred to as the Refinery, approximately 32 employees in the petitioned-for unit report to this address.
3. 20830 Lamm Road, Elmendorf, Texas 78112 – Bexar County;
 - a. Referred to as Elmendorf, eight employees in the petitioned-for unit report to this address.
4. 5999 County Road 211, Falls City, Texas 78113 – Karnes County;
 - a. Referred to as Falls City, approximately four employees in the petitioned-for unit report to this address.

Tr. 17-22. These locations are physically separate. Tr. 18. To accommodate a manual election, the Employer identified a central location where a manual election can safely take place: a building named the Firehouse, with an address of 7810 S. Presa Street, San Antonio, Texas 78223. Tr. 13, 24, 29-30 and Bd. Ex. 3.

1. Lazarus Energy Applies Safety Measures Designed to Keep Employees Safe and Which Facilitate a Manual Ballot Election.

Lazarus Energy has put all of its operations, including locations where employees in the petitioned-for unit work, in a safe position with strict, mandatory protocols. All refinery facilities operate in accord with all guidelines of the Centers for Disease Control and Prevention (“CDC”).

All of the following precautions (and others) are in place:

- Increased employee-wide communications regarding health and safety protocols;
- Additional cleaning resources and enhanced cleaning schedules to ensure sanitation;
- Additional cleaning supplies and sanitizers across the plant;
- High-touch surfaces repeatedly cleaned;
- Staggered and revised start, break, and lunch periods;
- Seating and/or common areas revised or closed;
- Physical markings on floors to maintain proper social distancing;

- Mandatory adherence to handwashing protocols;
- Provision and mandatory use of face masks; and
- Pre-shift screening procedures, including temperature screenings and health screening.

Bd. Ex. 4; E. Ex. 1. Lazarus Energy has captured many of these efforts in policies it enforces requiring masks, social distancing, cleaning shared equipment, and other prophylactic safety measures. Bd. Ex. 4; E. Ex. 1.

2. Cleaning Practices and Processes for Facilities Implicated by the Election.

With respect to cleaning practices at each location where employees in the petitioned-for unit report, each area performs the following in addition to complying with the previously outlines policies and related actions:

Administration Building:

- Lazarus Energy contracts third party [OpenWorks](#)⁴ to thoroughly clean facilities. The OpenWorks crew works after hours **daily**.
- OpenWorks uses EPA-approved disinfectant where appropriate.
- The Operations Manager (who works in his office daily) maintains a supply of disinfectants, hand sanitizers, masks and tape to provide to those working in the office and operations and regularly cleans his own office.
- Lazarus Energy also assigns a Security Officer who makes several rounds in the main office and hallways throughout the day to clean high-touch areas, including doorknobs, doors, and time clocks.
- A store of virus-effective disinfectants are supplied, as well as hand sanitizers, sanitizing wipes and Lysol spray.

Tr. 22-23 (emphasis added).

The Refinery:

- OpenWorks also cleans the Refinery daily.

⁴ OpenWorks is an established facility management and commercial cleaning service provider that helps organizations in industries such as healthcare, education, industrial/manufacturing, and property management keep their facilities cleaner, safer, and healthier. <<https://openworksworld.com/>>

- Once per week, another third-party contractor (CINTAS)⁵ to conduct disinfectant/decontamination cleaning of the control room building, including supervisor office and bathrooms.

Tr. 23-24.

Elmendorf/Falls City

- Both locations have a full supply of cleaning materials, including disinfectant, wipes, and hand sanitizers.
- These locations have a smaller workforce of employees who have been diligent with wiping down shared high-touch equipment before and after shifts.

Tr. 25.

Firehouse:

- Due to the minimal traffic of personnel, staff safety team members clean the site as use necessitates.
- Currently all trainings in this area have been discontinued.
- While the Firehouse remains unoccupied during the pandemic, a third-party contractor would be engaged to perform disinfectant/decontamination cleaning in advance of the vote.

Tr. 30.

3. The Facility Has Safely Continued Operations During the Coronavirus Pandemic.

The San Antonio Refinery and supporting operations have safely continued operations during the coronavirus pandemic. Eligible voters typically report to work on a daily basis and work for the entire shift. Approximately 100 Lazarus Energy employees are known to have been present in the facility within the past four months. There have been no work-related COVID-19 exposures at the refinery. Tr. 26. The following includes employees that work out of the overall operations at Lazarus Energy and presently (not just petitioned for employees but all of its employees that work out of that facility):

⁵ CINTAS is a well established provider of various industrial services, including disinfectant spray and sanitizer services. <<https://www.cintas.com/facilityservices/disinfectant-services-sanitizer-spray/>>

1. There are **zero** Lazarus Energy employees currently at any of the facilities implicated by this case that have tested **positive** for COVID-19 in the prior fourteen (14) days.
 - a. There was one employee who tested positive September 27, but that employee was released by a medical professional and returned to work on October 9, 2020.
2. Lazarus Energy is unaware of any employees that have been directed by medical professionals to proceed as if tested positive for COVID-19 within 14 days predating the Hearing.
3. During the previous four months, a total of ten (10) employees tested positive. With the exception of the most recent case described above, the most recent case was approximately three to four week. There was one employee who was directed by a medical professional to proceed as if tested positive for COVID-19 within the last four months.
4. Currently or within the last 14 days:
 - a. There are zero employees awaiting test results of a COVID-19 test;
 - b. Zero exhibiting symptoms of COVID-19;
 - c. Zero that have had direct contact with anyone who :
 - i. Tested positive for COVID-19;
 - ii. Is awaiting results for COVID-19; or
 - iii. Has been directed by medical professionals to proceed as if they have tested positive for COVID-19, despite not being tested.

Tr. 26-27; Bd. Ex. 5-6.

4. Karnes and Bexar County are Both Low Risk of COVID-19 Exposure.

The facilities at issue in this election are located in Karnes County and Bexar County, Texas. Both are low risk of COVID-19 exposure.

a. Karnes County (Falls City).

Karnes County, where the Falls City operations are located and where four employees in the petitioned-for unit report, has strikingly low numbers of positive COVID-19 cases. As of the date of the Hearing, there were four reported active cases. Tr. 28 (citing <http://www.co.karnes.tx.us/page/karnes.Home%20-%20Copy>). In fact, on September 30, 2020, County Judge Wade J. Hedtke applied for exemption from Texas Governor Order GA-29 (more specifically, the face-covering requirement) and the county is now exempt from this requirement. Tr. 28 (citing <https://tdem.texas.gov/ga29/>).

b. Bexar County (Administration Building; Refinery; Elmendorf; Firehouse).

The remaining Lazarus Energy employees in the petitioned-for unit report to locations in Bexar County. Tr. 28. Bexar County provides nonbinding health guidance to the public, where it has four categories to evaluate potential COVID-19 risk level – “Low”, “Moderate”, “Steady”, “Severe”, and “Critical.” Tr. 28. At the date of the Hearing, Bexar County was considered the lowest risk level. Tr. 28 (citing <https://covid19.sanantonio.gov/About-COVID-19/Dashboards-Data>). A close review of Bexar County’s COVID-19 data reveals that reports of positive COVID-19 test results are primarily in the “low” risk category:

- Testing capacity is “low” risk;
- Contact tracing is “low” risk;
- The Doubling rate is “low” risk;
- The Positivity rate is “low” risk;
- Hospital stress rate is “moderate” risk;
- 2 week decline is “steady” risk; and
- Hospital trends are “steady” risk.

Tr. 28-29 (citing <https://covid19.sanantonio.gov/About-COVID-19/Dashboards-Data>).

5. OSHA has Identified Refinery Work as Having the Lowest Risk of Spreading COVID-19.

The Occupational Safety and Health Administration (“OSHA”), the federal regulatory agency of the United States Department of Labor tasked with enforcing the Occupational Safety and Health Act (“OSH Act”), and related regulations, has published industry-specific guidance addressing the potential risk of exposure to COVID-19 in the workplace. Regarding potential workplace exposure to COVID-19, OSHA identified four risk categories: (1) “Lower”, (2) “Medium”, (3) “High”, and (4) “Very High.” <https://www.osha.gov/SLTC/covid-19/oil-gas.html>. With respect to the refinery industry, OSHA categorizes it in the lowest risk category, noting that employees in this industry typically perform “tasks that do not require frequent close contact with other coworkers, contractors, customers, or the public.” *Id.* Lazarus Energy’s operations mirror OSHA’s “Lower” risk of refinery industry employers.

6. The Firehouse, the Proposed Manual Ballot Voting Location, is Particularly Low Risk.

Lazarus Energy proposes to hold a manual ballot election at the Firehouse. In support of this position, at Hearing, Lazarus Energy submitted the following evidence:

- The Firehouse is physically separate from other Lazarus Energy locations where the petitioned-for unit employees work;
- The Firehouse features a garage with two bays;
- Each of the bays is large enough for a fire truck to be parked in it;
- Its dimensions are estimated at 50’ x 65’, and at least 15-20’ high;
- Both bay doors can be opened and each door is large enough for a fire truck to enter. It has open and very separate entry and exit;
- The location can be characterized as an outdoors facility with a roof;
- Tables can be set 6’ or more apart;
- Lazarus Energy will use portable Plexiglas to limit interaction;
- Consistent with Lazarus Energy’s policies and practices where appropriate, face coverings will be required;
- The Firehouse is easily accessible to employees in the petitioned-for unit: it is across the street from the Refinery, one mile away from the Administration

building, which is where maintenance and laboratory employees are domiciled, where Elmendorf operators come for daily health screenings, and where Falls City operators attend meetings).

Tr. 29-31; Bd. Ex. 3, Bd. Ex. 5; E. Ex. 1-2.

7. Small Number of Voters/Well-Spaced Voting Times

Here, there is a relatively small number of voters in the petitioned-for unit: a total of 57 voters and as proposed, there are six total hours of polls. Tr. 30. The majority of the employees in the petitioned-for unit are on four distinct shifts. Tr. 30.

I. THE REGIONAL DIRECTOR'S FINDINGS

The Regional Director did not ground his analysis in facts and the Decision turned established law on its head. In ordering a mail ballot election, the Regional Director identified and espoused the applicable legal standard here – the Board favors a manual ballot election absent extraordinary circumstances. The Regional Director then proceeded to reverse that legal standard in his analysis and found: elections in Region 16 will be by mail ballot election until he determines it is safe.

The Decision runs roughshod over the Act's charge, and the Board's statutory duty, to protect employee choice. The Regional Director does this by elevating a hypothetical safety risk over the record facts that Lazarus Energy has both existing measures in place and other measures proposed (fully consistent with the GC Memorandum 20-10) to safely conduct a manual ballot election at the Firehouse – easily accessible to all employees in the petitioned-for unit. The Regional Director, however, does not base his Decision on the facts of this case. Careful review of the Regional Director's Decision highlights his focus on a hypothetical risk, while ignoring the available guidance at the locations where employees in the petitioned-for unit work. The Regional Director scrutinizes events in Dallas and Tarrant Counties – locations unrelated to the employees

in the petitioned-for unit – followed by a cursory review of Bexar County, and **zero discussion** about Karnes County:

While cases may have currently plateaued in Bexar, Dallas, and Tarrant Counties, they remain significantly higher than in March, April, May, or June. **Dallas County, where the Board agent conducting the election may be traveling**, currently lists itself in the highest risk category for COVID-19 while **Bexar County, where the election would take place, assesses itself as low risk**. However, Dallas County and Bexar County use different measurements and neither the federal government nor Texas has established metrics for identifying a hotspot or surge or determining the risk of community spread. As I have already described, we have not reached a safe enough juncture from the peak of the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit person-to-person contact and travel within the state.

DDE, p. 17-18.

While recognizing all of the measures the parties have taken and will take to ensure social distancing, limited exposure, and heightened sanitation, the Regional Director directed a mail ballot election here. The Regional Director came to this conclusion even though an election would follow the same safety protocols already in place at Lazarus Energy's facilities, which means, in fact, the existence of an election does not increase potential transmission rates at all. While the CDC and the State of Texas recommend minimal interaction among individuals, this interaction is already taking place and has taken place for more than eight months without a confirmed positive case traced to the facility.

A manual ballot election does not increase the risk to employees and the precautions, as outlined by the General Counsel in GC 20-10, provide security for the Board Agents and union representatives who will enter the facility for a brief time. What the Regional Director ignores throughout the Decision is that these interactions exist with or without the voters participating in a manual ballot election that maximizes voter participation.

I. APPLICABLE LEGAL STANDARDS AND ANALYSIS

a. The Regional Director Should Order a Mail Ballot Election.

The Regional Director erred by misapplying the holding of *San Diego Gas & Electric*, 325 NLRB 1143 (1998), and the Board’s *Casehandling Manual Part Two: Representation Proceedings* (“*Casehandling Manual*”), Section 11301.2 (“Manual or Mail Ballot Election: Determination”). *San Diego Gas & Electric* establishes that Regional Directors should consider mail ballots in at least three situations: scattered voters, scattered schedules, and strike or lockout situations. The Board left open the possibility that other extraordinary circumstances may be relevant to election-type decisions. *San Diego Gas & Electric*, 325 NLRB at 1145, n.6.

Board precedent in representation cases rests upon the critical threshold consideration of which method of election best advances employee choice (voter turnout, ease of participation, etc.). Mail or mixed ballot voting only exists when necessary to “enhance the opportunity of all to vote.” *Casehandling Manual*, section 11301.2. *San Diego Gas & Electric* elaborates on this very same principle: “[e]xtraordinary circumstances” mandating a mail ballot election may occur when the Regional Director “might reasonably conclude that [voters’] opportunity to participate in the election would be maximized by utilizing mail or mixed ballot election methods.” *Id.* at 1145. Specifically, a Regional Director must tie their exercise of discretion, even in cases of extraordinary circumstances, to the Board’s proper role in ensuring employee participation and free choice. *Id.* at 1145 n.10 (“A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote”).

The Board and the Regional Director’s role is to ensure **maximum voter participation** and to “enhance the opportunities of all to vote.” *Id.* at 1145. Here, every eligible voter is present and works their regular shifts in a fully operational physical location. This fact, standing alone,

should end any inquiry into mail ballot issues. The best “opportunity to vote” clearly involves a manual, supervised election at the voters’ place of employment. Finally, the Board’s own actions strongly suggest that manual elections remain fully viable despite COVID-19 issues. The Board’s April 1, 2020, announcement states: “[T]he General Counsel now has advised that appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors.” News Release, NLRB Office of Public Affairs, (April 1, 2020). Had the Board intended to adopt a “mail ballot only” approach, it surely would have said so. On July 6, 2020, the General Counsel issued Memorandum 20-10 outlining the recommended protocols for a safe manual election. Had the General Counsel intended to adopt a “mail ballot only” approach, he surely would have also said so.

In recent cases, the Board has noted that it will continue to consider whether manual elections should be directed “based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.” *See Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (denying review of Regional Director’s decision to order a mail ballot election in Bronx, New York – one of the areas hardest hit with COVID-19); *see also Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020) (Board granted review and issued a stay of directed mail ballot elections where employer highlighted Regional Director’s failure to consider and apply low COVID-19 numbers in the area where election was scheduled).

In this case, the Regional Director has not tied the exercise of discretion to the Board’s proper role in ensuring maximum employee participation. Instead, the Regional Director viewed his discretion as absolute and directed a mail ballot election based on his view of the COVID-19

pandemic. It is an undeniable fact that the employees, coming to work every day, will not see an increase in their ability to vote by mail ballot, but instead it is likely to decrease.

Here, the Regional Director's attempt to analyze case-specific factors is deficient. First, the relevant pandemic statistics in Karnes and Bexar County are enviable when compared to the rest of the country. Other irrefutable facts marshaling in favor of a manual-ballot election include:

1. Lazarus Energy agreed to the protocols listed in GC Memorandum 20-10.
2. Lazarus Energy has robust cleaning protocols and related policies in place specifically designed to combat the potential risk of COVID-19. Bd. Ex. 4; E. Ex. 1.
3. OSHA – the federal government agency tasked with enforcing the OSH Act, has identified the refinery industry as one with a lower risk of COVID-19 exposure.
4. The location proposed for a manual-ballot election offers an ideal setting for such an event under the pandemic: enhanced sanitation, ventilation, accessible to employees in the petitioned-for unit.

Simply stated, a manual ballot election would be another activity that would be incorporated into the workday of each employee in the petitioned-for unit.

It is also an uncontroverted fact, backed up by statistics of the Board's elections during the pandemic; on average, fewer people participate in mail ballot elections than in manual ballot elections. Denying employees their right to vote by manual ballot — based upon analysis that focuses on Dallas and Tarrant Counties is unfounded. To follow the Regional Director's logic means that all elections should be by mail because there is always the possibility that someone from a different location might travel to where the election will take place and might transmit a

disease. In the abstract, mail ballots always ensure everyone has the chance to vote. This is not the reality of mail ballots and it is not the law.

b. Mail Ballot Elections Result in Reduced Voter Turnout.

Recent data definitively and empirically demonstrate that mail ballot elections significantly **diminish** turnout. Focusing first on data from Region 16, the NLRB’s records suggest that mail-in ballot elections for petitions filed after the pandemic hit American shores reflect a substantial reduction in voter participation. In those elections, there have been a total of 621 eligible voters, but only 464 have cast ballots – a 74.7% participation rate. Tr. 31:

Employer	Petition Date	Case Number	Total Workers	Total Votes	% Voting
ISS ACTION	7/31/2020	16-RC-263878	7	3	43%
LION ELASTOMERS	7/8/2020	16-RC-262751	7	6	86%
MDS BORING & DRILLING	6/11/2020	16-RC-261557	47	41	87%
SIKORSKY AIRCRAFT CORPORATION A LOCKHEED MARTIN COMPANY	6/10/2020	16-RC-261475	248	190	77%
MTM TRANSIT D/B/A RIDE RIGHT	5/28/2020	16-RC-260984	8	7	88%
MTM TRANSIT D/B/A RIDE RIGHT	5/28/2020	16-RC-260987	3	3	100%
MY CITY TRANSPORTATION	5/7/2020	16-RC-260092	65	40	62%
KERRY INC.	4/27/2020	16-RC-259638	184	142	77%
RHEEM MANUFACTURING COMPANY	4/21/2020	16-RC-259365	31	23	74%
T-MOBILE USA	4/7/2020	16-RC-258863	8	6	75%
VICTORY WINE GROUP	3/11/2020	16-RC-257874	13	3	23%

Tr. 31-36.

Expanding the scope of the analysis to include other Regions further underscores this concern. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs, Inc.*, No. 19-RC-256529 (75% rate). However, from March 14 to June 9, Regional Directors exclusively ordered mail ballot elections and ***nearly 40% of elections had a participation rate of 80% or less***. Indeed, COVID-19-related mail ballots have resulted in a very significant decrease in voter turnout compared to typical manual ballot elections. *See, e.g., Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op* No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846 (52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec’y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%).

Further, in *Fontanini Foods, LLC*, the Regional Director **twice** extended the mail ballot period because of low turnout. *Id.*, No. 13-RC-257636 (Reg’l Dir. June 29, 2020). In that case, the Region commingled ballots and counted on June 17, 2020. After low turnout, the Regional Director extended the initial mail ballot period until July 1, 2020. The Regional Director then extended the period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other troubling issues also arose in that case, including: some employees had to pay to receive the NLRB package, missing ballots, duplicate ballots, and a few employees attempted to contact the NLRB but never heard back about ballot issues. Ultimately, the Region only tallied 216 ballots in that case (despite claiming to have had 227 as of June 29).

All of these circumstances raise significant concerns as to the regularity and integrity of the mail ballot election process – votes being received at a Regional office and having to get forwarded elsewhere, it is more likely that voters might fail to sign their return envelopes, voiding

their votes, or mailing in a sample ballot because the voter . Tr. 32. Followed by ballot counts by Zoom, where the parties are unable to inspect ballots as clearly as during manual ballot elections. This is in contrast with the hallmarks of the manual ballot process and its simple, transparent procedures. At Hearing, Petitioner was not opposed to holding a manual-ballot election, confirming that the Regional Director is the only party actively opposing a manual ballot. Tr. 44.

The Regional Director did not address, nor even note the data specified above, which Lazarus Energy provided at the hearing and in its post-hearing brief, regarding the drag on participation in mail ballot elections generally. If voter turnout is of the utmost importance in representation cases, and the Board generally favors manual elections over mail ballot elections, the Regional Director should order a manual ballot election. Again, here, Lazarus Energy is an essential employer as defined by CISA, and features a workplace with lower exposure risk as OSHA has stated. Employees in the petitioned-for unit come to work every day – they will be present for work, election or no election. Furthermore, election or no election, they will safely interact just as much and in just the same fashion, following Lazarus Energy’s COVID-19 protocol, wearing masks, and observing appropriate social distancing. They should receive one of the major quintessential protections of the Act: a manual, secret ballot election.

c. The Regional Director Should Assess Safety Specific to the Circumstances and Precautions at the Employer's Facilities.

As part of the stipulation entered into evidence during the Hearing, Lazarus Energy detailed its commitment to comply with all safety protocols outlined GC Memorandum 20-10. Following all the safety protocols in GC Memorandum 20-10, which includes conducting the election with sufficient social distancing. Lazarus Energy's commitment to providing an environment that will allow employees to participate in a manual ballot election while doing nothing to increase COVID-19 transmission risk predates the petition for this election. In terms of safety rules and protocols, no reason exists to justify rejecting Lazarus Energy's request to a manual election.

While cases within the state of Texas have been higher than the facility location, Karnes County and Bexar County are not the rest of the state. Bexar County has self-identified as having "low" risk of disease transmission and Karnes County has even obtained an exception from Texas Governor Abbott to the face-covering requirement due to their low COVID-19 numbers. Tr. 28 (citing <https://tdem.texas.gov/ga29/>). Turning to the facilities impacted by this case, transmission of the virus has not been traced to any of the facilities where petitioned-for employees work. Lazarus Energy's protocols are working. These facts show the precautions taken by Lazarus Energy are an effective prophylactic against the virus. There is no reason to believe they would not be effective in a manual election.

The Regional Director claimed the election would require voters who do not work together to interact, even though they all work together every day in nearly the exact same setting. Social distancing procedures are already in place to allow people to come together in a safe manner. Further, Lazarus Energy has already agreed to release employees in an orderly fashion to facilitate voting and safety. The voters will be entering and exiting the voting facility with the employees they already work with each day. The Regional Director's focus on travel by the Board agent from

the Dallas/Fort Worth area is also misplaced. The Region maintains a Resident Office in San Antonio staffed by a Resident Officer who presumably is qualified to conduct a representation election. Notably, Karnes County – where several employees in the petitioned-for unit report – was barely mentioned in the Regional Director’s Decision, while Dallas and Tarrant Counties were referenced repeatedly. DDE, p. 9, 11, 13, 17.

The Regional Director also focused on the “challenge ballot” process and noted that interaction amongst employees and Board Agents during the challenge ballot process would increase risks. Again, the protocols outlined in GC Memo 20-10 and Lazarus Energy’s procedures are designed to minimize risk while effecting the purpose of the National Labor Relations Act. The Board prefers manual ballot elections and the General Counsel has outlined protocols to ensure the ability to have those elections in person as the pandemic comes under control. The Regional Director’s decision in this case, as it relates to the challenge ballot procedure, essentially precludes manual ballot elections in Region 16 under any circumstances.

The Regional Director seemed significantly influenced by the fact that pre-symptomatic and asymptomatic individuals could show up and carry the virus into the voting area, thus creating an untenable risk. DDE, p. 16. The Regional Director identifies no factual basis for this conclusion. In fact, there is no evidence in the record that employees are currently violating the social distancing guidelines in place. The only evidence in the record shows that in fact, those guidelines are working. No transmissions linked to the facility and only a handful of positive cases amongst employees generally, in eight months of operations. It is true that asymptomatic individuals could appear and vote. This is precisely why GC Memo 20-10 outlines necessary precautions. GC Memo 20-10 was not drafted to protect employees and Board Agents from healthy individuals – that would be unnecessary. The CDC and the General Counsel designed the current safety precautions

precisely to minimize the risk of transmission between asymptomatic carriers and healthy individuals.

The Regional Director's Decision repeatedly ignores the reality of employees in the petitioned-for unit: they all work together every day in settings similar to those that would take place during an election. Social distancing procedures are already in place to allow people to come together in a safe manner, and there is no reason to believe they would not be observed while voting, just as they are while working, while on break, and while entering and leaving the facilities in question.

The Regional Director also seems to believe that until the virus is eradicated, the challenge ballot procedure will always provide increased risk and so there cannot be a manual ballot election, despite the Board's preference and the General Counsel's protocol for such an event.⁶ By the Regional Director's logic, GC Memo 20-10 is useless unless and until COVID-19 disappears. This is not the Board's intent. Here, the Regional Director abused his discretion by basing his Decision on the mere possibility of future negative circumstances. The Regional Director's Decision ignored the specific safety situation and protocols at the facilities where employees in the petitioned-for unit work and, instead, overly focused on the general state of the pandemic and hypothetical negative possibilities. At the same time, the Decision gave little consideration to the legal precedent and facts favoring a manual ballot election. This was in error.

d. The Regional Director's Decision Violates Current Board Election Jurisprudence and is Inapposite with NLRB General Counsel's Memorandum 20-10.

The Board reactivated election proceedings in an April 17, 2020, announcement entitled "COVID-19 Operational Status," stating, "[c]onsistent with their traditional authority, Regional

⁶ Lazarus Energy does not concede that the challenged ballot procedure cannot be done without increased risk. Masked individuals, behind Plexiglas barriers can instruct individuals on filling out a challenged ballot and ensure that the challenged ballots are not contaminated.

Directors have discretion as to when, where and if an election can be conducted, in accordance with NLRB precedent.” We are aware of at least four elections that were held in-person following the lifting of the election moratorium, and there has been no report of any problems with any such election. For example, in Byhalia, Mississippi, Hearthside Food Solutions LLC workers successfully voted in person without issue. *Hearthside Food Solutions LLC*, Case No. 15-RC-258901 (Region 15 June 3, 2020). There, the parties agreed to implement several safety measures, including: erecting Plexiglas barriers to separate workers, Board employees, and election overseers; using disposable pens and pencils; marking off spaces at 10-foot intervals; providing masks and gloves; and separating the entrance and exit so workers would not pass each other.⁷ In that case, no individuals reported infection from COVID-19 at the end of the fourteen-day period post-election.

With the experience of these elections, and the benefit of a variety of health information regarding the pandemic, on July 6, 2020, the Board’s General Counsel, Peter B. Robb released GC Memorandum 20-10 on “Suggested Manual Election Protocols.” See GC Mem. 20-10. GC Memorandum 20-10 outlines numerous election protocols to ensure a safe election. Lazarus Energy committed to comply with all the procedures listed. The Employer will implement every suggestion in the GC Memorandum practicable, and will work with both the Region and the Petitioner regarding any additional concerns. While the Regional Director acknowledges GC 20-10, he challenges it and again invites speculation: “neither GC 20-10 nor the CDC’s election guidelines have been updated to address the airborne transmission of COVID-19.” DDE, p. 17. While it is true that the COVID-19 pandemic has featured changes in guidance and best practices around mitigating against its risks, the Regional Director’s Decision cherry-picks which guidance

⁷ Lazarus Energy has offered to do all of those things here.

applies, emphasizing the CDC's comments while ignoring OSHA's specific publication addressing the oil and gas industry.

Other Regions have successfully operated manual elections subject to social distancing procedures. *See, e.g. Watson Bowman Acme Corp.*, No. 03-RC-262231 (August 19, 2020 election); *Gulfport Energy Corporation*, No. 08-RC-263572 (September 10, 2020 election at a natural gas operation where, similar to Lazarus Energy, required employees to report to a central location for work, and thus, participating in a manual-ballot election did not constitute a significant departure from their typical workday). The Board has recognized that elections can be safely conducted following these safeguards. *Aspirus Keweenaw*, 370 NLRB No. 13; *Draper Valley Farms*, 370 NLRB No. 20 (September 9, 2020); *ClarkWestern Dietrich Building Systems, LLC*, 01-RC-264014 (unpublished September 16, 2020); *Airgas USA, LLC*, No. 16-RC-262896 (unpublished September 24, 2020); *Ecolab Production LLC*, No. 16-RC-264667 (unpublished October 1, 2020).

In light of these facts, applicable precedent and the guidance of GC Memorandum 20-10 suggest a manual-ballot election can be safely conducted, and the Regional Director should focus on the case-specific facts to order a manual ballot.

The Board Should Issue An Immediate Stay of Mail Ballot Distribution.

The Decision indicates that the Region will distribute mail ballots on November 3, 2020. In order to prevent potential voter confusion and irreparable injury to the election process, the Board should issue an immediate stay of mail ballots in this case while it considers this Request for Review, as it did in *Aspirus Keweenaw*, 370 NLRB No.13 (August 25, 2020), *Airgas, USA LLC*, 16-RC-262896 (September 24, 2020) and *Ecolab*, 16-RC-264667 (October 1, 2020).

CONCLUSION

Considering the above facts and authorities, Lazarus Energy respectfully requests that the Board grant this Motion, stay the mail ballot election, and order a manual ballot election. The Regional Director's Decision ignores clear facts: no NLRB election, grocery store trip, or any other activity requiring interaction with another human being will be zero-risk in the near future. A manual election here, however, will incur as near to zero risk as possible with all the protocols in place. Lazarus Energy reaffirms its willingness to institute any protocol practicable to ensure a manual election.

As to the viability of mail ballots, Board precedent and voter safety compel a manual ballot in these circumstances. None of the factors listed by Board precedent as permitting consideration of a mail ballot are present. There is no pending job action of any kind. The voters are not "scattered" in any sense contemplated by the Board. All of them work at locations under conditions carefully controlled by Lazarus Energy to protect their health and safety. Thus, not only is a manual ballot actually safer for the voters in the instant circumstances, but manual voting has a proven record of ensuring higher percentage of voter participation, which is an integral duty of the Board.

Lazarus Energy's facilities are and have been safely operational with a full complement of eligible voters. All CDC, local and other guidelines are in place. The facility where Lazarus Energy has proposed to hold a manual ballot election is a large facility with ample open/extra space, proper ventilation and lighting. The voting area is approximately 50' x 65', at least 15-20' high and has large bay door openings to allow the free flow of air. There is ample room to allow voters, election observers and Board official(s) to maintain proper social distancing.

Lazarus Energy's facilities undoubtedly constitute a far safer environment than the average supermarket, convenience store or other "essential" place of business that the average person (and,

perhaps, voters, election observers and government officials) may have visited throughout the pandemic. In the final analysis, there is no reason to justify a mail ballot in this matter.

Dated this the 27th day of October, 2020.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/ Bindu R. Gross

Rodolfo R. Agraz*

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**Currently licensed in Pennsylvania and West Virginia only; practice limited exclusively to federal labor and workplace safety law.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

LAZARUS ENERGY HOLDINGS, LLC)	
)	
Employer,)	
)	
and)	Case No. 16-RC-266439
)	
UNITED STEEL, PAPER AND)	
FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY,)	
ALLIED-INDUSTRY AND SERVICE)	
WORKERS INTERNATIONAL UNION)	
AFL-CIO)	
)	
Petitioner.)	
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Emergency Motion to Stay Mail Ballot Election and Request for Review of the Regional Director's Decision and Direction of Election has been served on the following on the date below by Lazarus Energy Holdings, LLC:

Timothy L. Watson, Regional Director
Zachary Long, Field Examiner
National Labor Relations Board - Region 16
zachary.long@nlrb.gov
By Electronic Filing and Email

Brad Manzollillo
Dionisio Gonzalez
bmanzollillo@usw.org
dgonzalez@usw.org
By Email

Dated this the 27th day of October, 2020.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/ Bindu R. Gross
Bindu R. Gross*
Attorney for Lazarus Energy Holdings, LLC

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